The Prosecutor's Manual
Chapter 14
Priors for Enhancement

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The Prosecutor's Manual Volume II
Chapter 7
Priors for Enhancement

I. THE PROSECUTOR AND PRIORS

The comment to A.R.S. § 13-703 provides: "The code seeks to strengthen the sanctions of the criminal justice 'system' by isolating the dangerous and repetitive criminal for longer periods of incarceration." The proof of a prior provides for a higher ceiling and mandatory time.

The provisions of A.R.S. §13-604 (now §13-703) are mandatory! *State v. Thomas*, 217 Ariz. 413, 416, 175 P.3d 71, 74 (App. Div. 1 2008), vacated on other grounds by 219 Ariz. 127 (2008); *State v. Nguyen*, 208 Ariz. 316, 318, 93 P.3d 516, 518 (App. Div. 1 2004); *State v. Garcia*, 189 Ariz. 510, 514, 943 P.2d 870, 874 (App. Div. 1 1997); *State, v. McGriff*, 7 Ariz.App. 498, 441 P.2d 264 (1968); *State v. Jacobson ,* 18 Ariz.App. 538, 504 P.2d 69 (App. Div. 2 1973), vacated on other grounds, 110 Ariz. 70, 515 P.2d 27 (1973).

An old case, *State v. Valdez*, 48 Ariz. 145, 59 P.2d 328 (1936), overruled in part by *State ex rel. Morrison v. Superior Court*, 82 Ariz. 237, 311 P.2d 835 (1957), holds that the court's failure to impose enhanced punishment voids the sentence and, therefore, the failure to do so is not appealable. Rather, the appropriate remedy is mandamus (special action). A.R.S. §13-4032 however, appears to allow an appeal. If the court fails to impose the proper sentence, it is malfeasance. A.R.S. §13-701(I). The court cannot strike the prior. *State v. Davis*, 108 Ariz. 335, 498 P.2d 202 (1972).

A prior conviction gives the State plea bargaining leverage. The State can allege the prior and dismiss it later pursuant to a plea agreement or threaten to allege the prior if the defendant does not accept the proposed plea bargain. *Bordenkircher v. Hayes,* 434 U.S. 357, 98 S.Ct. 663, (1978); *State v. Brun*, 190 Ariz. 505, 506, 950 P.2d 164, 165 (App. Div. 1 1997); *State v. Morse,* 127 Ariz. 25, 617 P.2d 1141 (1980). *See also State v. Norgard*, 108 Ariz. 435, 501 P.2d 377 (1972).

Where the defendant has a prior conviction, but the State did not allege and prove it for A.R.S. §13-703 purposes, the court can, however, consider the prior as an aggravating circumstance under A.R.S. S13-701(d)(11). *State v. Davis*, 134 Ariz. 87, 88, 654 P.2d 21, 22 (App. Div. 2 1982); *Ponds v. State ex rel. Eyman,* 7 Ariz.App. 276, 438 P.2d 423 (1968); *State v. Bridges*, 12 Ariz.App. 153, 468 P.2d 604 (App. Div. 1 1970); and *State v. Jackson,* 130 Ariz. 195, 635 P.2d 180 (App. Div. 2 1981). When doing so, the court should carefully state that it is only using the prior as an aggravating circumstance and not sentencing under the enhanced punishment provisions. *State v. Williamson,* 104 Ariz. 9, 448 P.2d 65 (1968), and *Jackson, supra.*

An interesting question is whether the court can use a prior(s) to enhance punishment pursuant to A.R.S. §13-703 (thereby increasing the range of sentence) and then consider the same prior(s) as an aggravating circumstance to give greater than the presumptive sentence under A.R.S. §13-701(D)(11). While the courts have not decided this precise issue, they have held that the court can consider a second prior felony conviction as an aggravating circumstance after the defendant plead guilty to a criminal offense with one prior felony conviction. *Van Norman v. Schriro*, 616 F.Supp.2d 939 (D. Ariz. 2007).

Furthermore, a deadly weapon can give rise to mandatory A.R.S. §13-703 treatment and additionally be used as an A.R.S. §13-701 aggravating circumstance. *State v. Bly*, 127 Ariz. 370, 621 P.2d 279 (1980); *State v. Inglish*, 129 Ariz. 444, 631 P.2d 1102 (App. Div. 2 1981); *State v. Rybolt*, 133 Ariz. 276, 650 P.2d 1258 (App. Div. 1 1982), overruled in part by *State v. Diaz*, 142 Ariz. 119, 688 P.2d 1101 (1984); and *State v. Rodriquez*, 145 Ariz. 157, 700 P.2d 855 (App. Div. 1 1984), overruled on other grounds by *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996). In *Bly*, the court held:

> Appellant would have us hold that double jeopardy and double punishment prohibitions prevent the legislature from considering an element of a crime more than once in exercising its authority to prescribe punishment for a single crime. We decline to do so.

Id. at 371.

In *State v. Davis*, 134 Ariz. 87, 654 P.2d 21 (App. Div. 2 1982), the court held that the same element could be used to determine a crime and enhance punishment therefore. See also *State v. Martinez*, 127 Ariz. 444, 447-48, 622 P.2d 3, 6-7 (1980) (where the use of a gun was an element in the armed robbery charge and was also use to enhance the sentence).

The logic of the above cases dictates that the court can use the same prior that served A.R.S. §13-703 purposes for A.R.S. §13-701 purposes. *State v. Torrez*, 141 Ariz. 537, 687 P.2d 1292 (App. Div 1 1984).

The prosecutor has the *sole* discretion to allege prior convictions to enhance punishment. *State v. Spellman,* 104 Ariz. 438, 454 P.2d 980; *supplemented,* 104 Ariz. 597, 457 P.2d 274 (1969); *State v. Jacobson,* 18 Ariz.App. 538, 504 P.2d 69 (App. Div 2 1973), vacated on other grounds by 110 Ariz. 70, 515 P.2d 27 (1973); see also *State v. Hankins*, 141 Ariz. 217, 221, 686 P.2d 740, 744 (1984). In *Jacobson,* the trial court denied the State's motion to file an addendum. The appellate court held:

> We believe the respondent court's ruling was arbitrary and unreasonable. In fact, it may be characterized as being a substitution of the court's judgment for that of the prosecutor in a matter which has been left to the discretion of the latter. The only legislatively-imposed limitation upon the prosecutor is that allegations of priors be filed prior to trial and that the defendant be furnished information relative thereto. We are of the opinion that mere speculation as to possible consequences if defendant were convicted of all, pending charges did not justify denying the State's motion.

Id. at 540-41.

The Grand Jury cannot consider and allege prior convictions. *State v. Birdsall,* 116 Ariz. 112, 568 P.2d 419 (1977), overruled on other grounds by *State v. Burge,* 167 Ariz. 25, 804 P.2d 754 (1990); see also *State v. Hadd*, 127 Ariz. 270, 277, 619 P.2d 1047, 1054 (App. Div. 2 1980). In fact, if you let a Grand Jury hear about the defendant's priors, you will certainly have to litigate a motion for new finding of probable cause.

II. PRIORS AS ENHANCEMENT

A. Definition and Constitutionality

A prior conviction is a conviction for a crime which has been entered prior to the time of the sentencing in the case for which it is offered for enhancement purposes. The use of prior convictions to enhance punishment has been held to be constitutional. *State v. Hickey,* 114 Ariz. 394, 561 P.2d 315 (1977); *State v. Cummings*, 148 Ariz. 588, 591, 715 P.2d 45, 48 (App. Div. 2 1985) (enhancement for prior convictions is not a violation of separation of powers); *State v. Quinonez*, 194 Ariz. 18, 19-20, 976 P.2d 267, 268-69 (App. Div. 1 1999) (having court determine existence of prior convictions does not violate right to jury trial). The use of a prior to enhance punishment does not violate double jeopardy. *State v. Mauro*, 159 Ariz. 186, 208-09, 766 P.2d 59, 81-82 (1988); *State v. Allen*, 111 Ariz. 125, 524 P.2d 502 (1974); *State v. Evans,* 25 Ariz.App. 315, 543 P.2d 153 (App. Div 2 1976). The fact that but for two priors the instant offense could otherwise be treated as a misdemeanor does not render the statute unconstitutional. *State v. Pacheco,* 152 Ariz. 85, 730 P.2d 262 (App. Div. 2 1986). The use of a prior does not violate the *Ex Post Facto* Clause. *State v. Allie*, 147 Ariz. 320, 710 P.2d 430 (1985).

Throughout this work the word "prior" is used despite the fact that it is not an entirely accurate term. Arizona's statute is not a "prior" statute in the traditional sense, but rather a "repetitive offender" statute. *See State v. Rybolt,* 133 Ariz. 276, 650 P.2d 1258 (App. Div 2 1982), overruled on other grounds by *State v. Diaz*, 142 Ariz. 119, 688 P.2d 1101 (1984). Since however "prior" is the term of art used, to generally describe the recidivist statute, that shorter term will be used.

B. Nature of Conviction

First, there must be a conviction. *State v. Fallon*, 151 Ariz. 188, 190-91, 726 P.2d 604, 606-07 (App. Div. 1 1986); *State v. Robinson,* 6 Ariz.App. 419, 433 P.2d 70 (1967), overruled in part on other grounds by *State v. Newman*, 122 Ariz. 433, 595 P.2d 665 (1979).

The fact that the sentence was suspended, and the defendant placed on probation, does not affect the validity of the prior. *State v. Robison,* 99 Ariz. 241, 408 P.2d 29 (1965). See also *State v. Fallon, supra.* which states that class 6 felonies that remain “open” for designation count as felonies until they are designated as misdemeanors. The prior offense does not have to be the same type of offense as the instant offense. *State v. Dodd,* 101 Ariz. 234, 418 P.2d 571 (1966).

The exception to this Rule is dangerous versus non-dangerous offenses. See section III(A), *infra.*

C. Sufficiency of the Prior

1. General

The prior must be a felony or the equivalent. The court does not have to "retry" the previous case to verify the correctness of the result. *State v. Pavao,* 23 Ariz.App. 65, 530 P.2d 911 (App. Div. 2 1975); *State v. Salazar,* 3 Ariz.App. 114, 412 P.2d 289 (1966), overruled in part by *Smith v. Eyman*, 104 Ariz. 296, 451 P.2d 877 (1969) (Beware of the *Salazar* case, however, because the court also held that it was improper to raise the fact that defendant was not represented by counsel on the prior conviction); *State v. Britson,* 130 Ariz. 380, 636 P.2d 628 (1981); see also *State v. Osborn*, 220 Ariz. 174, 178, 204 P.3d 432, 436 (App. Div. 1 2009).

An undesignated offense (classification as misdemeanor or felony to be determined after completion of probation) may be alleged as a prior unless and until designated otherwise. *State v. Fallon*, 151 Ariz. 188, 190-91, 726 P.2d 604, 606-07 (App. Div. 1 1986); *State v. Risher,* 117 Ariz. 587, 574 P.2d 453 (1978).

If, however, the prior open-ended offense occurred between the adoption of the new code in 1978, and the modification of A.R.S. § 13-702(H) (now §13-604) (August 3, 1984), the open-ended offenses may not be used as a prior. *State v. Sweet,* 143 Ariz. 266, 693 P.2d 921 (1985); *State v. Cannon,* 148 Ariz. 72, 713 P.2d 273 (1985); and *State v. Fallon,* 151 Ariz. 192, 726 P.2d 608 (1986). Where an offense occurred prior to August 3, 1984, but sentencing occurs after that date, an open-ended sentence may be utilized since the provision is procedural. *State v. Winton,* 153 Ariz. 302, 736 P.2d 386 (App. Div. 1 1987).

You may also allege and prove an out-of-state undesignated offense as long as it has not yet been designated as a misdemeanor. *State v. Peeler,* 126 Ariz. 254, 614 P.2d 335 (1980).

A prior conviction can be alleged and used to enhance punishment even though that conviction is pending on appeal. *State v. Jordan*, 126 Ariz. 283, 287, 614 P.2d 825, 829 (1980); *State ex rel. Corbin v. Court of Appeals, Division I*, 103 Ariz. 315, 441 P.2d 544 (1968), and *State v. Swartz,* 140 Ariz. 516, 683 P.2d 315 (App. Div. 2 1984).

A conviction resulting from a *nolo contendere* (no contest) plea may be used to enhance punishment. *State v. Stone,* 122 Ariz. 304, 594 P.2d 558 (App. Div. 1 1979).

The United States Supreme Court has held that a state conviction could be counted as a prior for purposes of the Federal Gun Control Act even though the conviction had been expunged pursuant to state law. *Dickerson v. New Banner Inst.,* 460 U.S. 103, 103 S.Ct. 986 (1983), superceded on other grounds by statute as stated in *Logan v. United States*, 552 U.S. 23, 128 S.Ct. 475 (2007); see also *State v. Green*, 174 Ariz. 586, 588, 852 P.2d 401, 403 (1993).

In *State v. Hoover,* 151 Ariz. 470, 728 P.2d 689 (App. Div. 2 1986), the court considered an adult conviction in another state which would be a juvenile conviction in Arizona. The court held that age is not an element of the offense and that the prior may be utilized if it otherwise meets the requirements. See section 11(D), *infra.*

2. When it Occurred

If the prior felony is a class 4, 5, or 6 felony that prior felony must have been committed within "five years immediately preceding the date of the present offense." A.R.S. §13-105(22)(c). Any time spent incarcerated does not count toward the ten year time limit. A.R.S. §13-105(22)(b),(c); *State v. Graves*, 188 Ariz. 24, 27, 932 P.2d 289, 292 (App. Div. 1 1996). *Cf*., Rule 609 (b), Arizona Rules of Evidence. For prior felony convictions that were class 2 or 3 felonies, that felony must have been committed within "the ten years immediately preceding the date of the present offense." A.R.S. § 13-105(22)(b). Additionally, any felony conviction that is a "third or more prior felony conviction" can be used with no time limit. A.R.S. § 13-105(22)(d).

3. Right to Counsel on Prior

Priors can only be used if the defendant had been represented by counsel, but there is a rebuttal presumption or regularity that judgments were constitutionally obtained. *State v.*

McCann, 200 Ariz. 27, 30-31, 21 P.3d 845, 848-49 (2001); *State v. Flores*, 160 Ariz. 235, 238-39, 772 P.2d 589, 592-93 (App. Div. 1 1989) (where record shows that defendant was represented in prior proceedings, even without discussing sentencing); *State v. Dawes*, 156 Ariz. 526, 528-29, 753 P.2d 1182, 1184-85 (App. Div. 2 1987) (defendant's statements to the court sufficient to establish that he had counsel at prior proceedings).

A defendant may waive his right to counsel, and if he validly does so, the prior can be used. *State v. Hatch*, 156 Ariz. 597, 598, 754 P.2d 324, 325 (App. Div. 1 1988); *Smith v. Eyman,* 104 Ariz. 296, 451 P.2d 877 (1969); *State v. Bridges,* 12 Ariz.App. 153, 468 P.2d 604 (App. Div. 1 1970). Where the defendant was represented at trial, but not at sentencing, the sentence is invalid, not the conviction. Therefore, the State can use it to enhance punishment. *State v. Sample,* 107 Ariz. 407, 489 P.2d 44 (1971), disapproved of on other grounds by *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408 (1978); *State v. Russell,* 108 Ariz. 549, 503 P.2d 377 (1972). Where the record on the prior reflects a waiver of counsel, the court may presume the regularity of those proceedings and a valid waiver of counsel. *State ex rel. Dean v. City Court of City of Tucson*, 161 Ariz. 414, 416, 778 P.2d 1310, 1312 (App. Div. 2 1989); *State v. Hoover,* 151 Ariz. 470, 728 P.2d 689 (App. Div. 2 1986).

Where defendant's attorney admitted the prior for the defendant, the admission stood (but don't ever sit by and watch a mistake like that happen!). *State v. Tomes,* 108 Ariz. 272, 496 P.2d 133 (1972).

In *State v. Hooker,* 131 Ariz. 480, 642 P.2d 477 (App. Div. 2 1982), the defendant had an uncounseled juvenile DUI conviction. The conviction and other driving infractions resulted in a suspension of his driver's license. Shortly thereafter, he attained majority and committed another DUI. The court upheld a charge of felony DUI (suspended license) against the defendant, despite the fact that the state was be precluded from filing a misdemeanor second offense DUI!

4. Notice of Insufficiency of Prior

If the defendant intends to attack the sufficiency of the prior, he must put the State on notice. Rule 15.2(b), Arizona Rules of Criminal Procedure.

D. Jurisdiction of Prior

If the defendant has been convicted of an offense in another jurisdiction, or in Arizona under the prior code, you may use the conviction for enhancement purposes. A.R.S. §13-703(M). A prior conviction committed in another state, if similarly unlawful in Arizona, can be used to enhance punishment, and the enhancement provisions are mandatory. *State v. Smith*, 219 Ariz. 132, 134, 194 P.3d 399, 401 (2008); *State v. Norris*, 221 Ariz. 158, 160-61, 211 P.3d 36, 38-39 (App. Div. 2 2009) (whether the foreign conviction would be a felony in Arizona is determined by examining the elements of the crime to ensure ; the specific facts of the offense cannot be considered); *State v. Valdez,* 48 Ariz. 145, 59 P.2d 328 (1936), overruled in part on other grounds by *State ex rel. Morrison v. Superior Court*, 82 Ariz. 237, 311 P.2d 835 (1957); *State v. Smith,* 126 Ariz. 534, 617 P.2d 42 (App. Div. 2 1980).

The court can take judicial notice that the offense would be a felony in Arizona. *State v. Smith*, 219 Ariz. 132, 134, 194 P.3d 399, 401 (2008); *State v. Robertson,* 128 Ariz. 145, 624 P.2d 342 (App. Div. 2 1981). Admission by a defendant of a foreign conviction does not establish that the foreign offense would be a felony in Arizona. *State v. McCurdy*, 216 Ariz. 567, 574, 169 P.3d 931, 938 (App. Div. 2 2007). Where the other state's name designation is

the same as Arizona's, it is presumed that the conviction carried with it all of the essentials of the crime in Arizona, and if it is contended to the contrary that is a matter of defense which must be raised by defendant. *State v. Valdez,* 49 Ariz. 115, 65 P.2d 29 (1937), overruled in part on other grounds by *State ex rel. Morrison v. Superior Court*, 82 Ariz. 237, 311 P.2d 835 (1957).

In *State v. Simmons,* 131 Ariz. 482, 642 P.2d 479 (App. Div. 2 1982), a collateral attack on an out-of-state prior was rejected. The court held that the judgment was presumptively valid and entitled to full faith and credit where the record showed that the defendant was represented by counsel and no constitutional errors appeared in the record. See also *State ex rel. Collins v. Superior Court*, 157 Ariz. 71, 75, 754 P.2d 1346, 1350 (1988).

A federal offense over which Arizona could have no jurisdiction can nevertheless be used to enhance punishment (robbery of a federal bank). *State v. Canada,* 107 Ariz. 66, 481 P.2d 859 (1971). The continuing validity of that opinion is questionable however after *State v. Wilson,* 152 Ariz. 127, 730 P.2d 836 (1986). In *Wilson,* the court considered a federal statute which was similar to Arizona law but with some distinctions. Without mentioning *Canada*, the court held that the prior could not be utilized, as the federal conviction for misprision of felony was broader than the Arizona crime of hindering prosecution. As with all other jurisdictions, the key inquiry is whether the elements of the federal statute includes every element to prove an Arizona felony. *State v. Crawford*, 214 Ariz. 129, 131, 149 P.3d 753, 755 (2007).

E. A Prior Within the Indictment

The State may join several offenses which happened on different occasions pursuant to Rule 13.3, Arizona Rules of Criminal Procedure, try all counts against the defendant to one jury at the same time, and have each offense serve as a "prior" to all counts which occurred subsequent in time. See A.R.S. §13-703(A), (B)(1); *Davis v. Superior Court,* 126 Ariz. 568, 617 P.2d 520 (1980); *State v. Rybolt,* 133 Ariz. 276, 650 P.2d 1258 (App. Div. 1 1982), overruled in part by *State v. Diaz*, 142 Ariz. 119, 120, 688 P.2d 1011, 1012 (1984) (holding that when two offenses committed at different times are tried together, only one of the offenses can list the other as a prior.); and *State v. Rodgers,* 134 Ariz. 296, 655 P.2d 1348 (App. Div. 1 1982).

In a multi-count indictment, the third and subsequent counts all have two priors. It should be noted however that the first count (in time) has no priors and the second has one. *State v. Schneider*, 148 Ariz. 441, 715 P.2d 297 (App. Div. 1 1986).

Whether the offenses occurred on the "same occasion" is a question of fact and it is error for the court to strike the allegation prior to the evidence being heard. *State v. Roylston,* 135 Ariz. 271, 660 P.2d 872 (App. Div. 2 1983). The decision on the evidence, however, is a question to be decided by the trial court, not the jury. *State v. Sands,* 145 Ariz. 269, 700 P.2d 1369 (App. Div. 2 1985). *Sands* also contains a good discussion with regard to "same occasion."

It should be noted here that a vague conspiracy to commit several acts does not necessarily mean a "spree" offense and therefore one occasion. *State v. Perkins,* 144 Ariz. 591, 699 P.2d 364 (1985), overruled on other grounds by *State v. Noble*, 152 Ariz. 284, 731 P.2d 1228 (1987). See, also, *State v. Stein,* 153 Ariz. 235, 735 P.2d 845 (App. Div. 1 1987).

If you intend to enhance punishment with crimes contained in the same indictment, make sure you give the defendant notice. See *Rodgers, supra,* for what will happen if you do not give notice.

Where the state is alleging priors within the indictment, the jury does not have to redeliberate on the priors issue when the jury finds the defendant guilty, and all priors within the indictment are proved. *State v. Alder,* 146 Ariz. 125, 704 P.2d 255 (App. Div. 2 1985); and *State v. Turrentine*, 152 Ariz. 61, 730 P.2d 238 (App. Div. 2 1986).

F. Misdemeanors

If a defendant commits the same misdemeanor, other than a traffic offense, twice within two years, the classification of the offense is raised one grade, A.R.S. § 13-707(B).

When dealing with a Class 2 or 3 misdemeanor, the State should file an addendum alleging the prior and reciting the prior as a basis for increasing the classification one grade. If the case is tried to the court, there should be no problem with presenting all of the facts to the magistrate.

If the case is tried to a jury, only the facts relevant to the instant offense should be presented initially. See Rule 19.1(b), Arizona Rules of Criminal Procedure, and *State v. Geschwind,* 136 Ariz. 380, 666 P.2d 480 (App. Div. 2 1982), reversed in part on other grounds by 136 Ariz. 360, 666 P.2d 460 (1983). After the guilty verdict on the initial charges, the facts surrounding the prior should be presented to the jury. Where the prior offense is an element of the current offense, the defendant has no right to a bifurcated trial, as the prior is an element and not just a sentencing consideration. *State v. Geschwind*, 136 Ariz. 360, 362-63, 666 P.2d 460, 462-63 (1983). See Section IV, *infra*.

Where the offense is a Class 1 misdemeanor, it will become a Class 6 felony. If the State chooses to utilize a preliminary hearing, it would seem to be no problem to present all of the facts at one time to the magistrate. If the State chooses the grand jury option, it would seem wise to let the grand jury deliberate first on the recent case and then on the prior.

III. ALLEGING PRIORS

A. Filing The Allegation

A.R.S. §13-703(N) provides "that when the allegation of a prior conviction is filed, the State must make available to the defendant a copy of any material or information obtained concerning the prior conviction." There is little Arizona case or statutory law defining what constitutes "material or information." *See generally State v. Hooker,* 128 Ariz. 251, 624 P.2d 1299 (App. Div. 1 1981).

Ideally you will file a copy of a certified-exemplified copy of the entry of judgment and sentence and/or a copy of a certified-exemplified copy of the defendant's "pen pack" (prison records). The "pen pack" usually includes the entry of judgment and sentence, a photo, and fingerprints.

Notice the deliberate use of "a copy of a certified-exemplified copy of." *Do not* file the actual certified-exemplified copies you receive from the court or the Department of Corrections. Even the court's original of the allegation should have a *copy* of the certified-

exemplified copy attached. That is because you will want to have the actual certified-exemplified copy marked and admitted into evidence. Make sure that when the secretary photocopies the certified-exemplified copy ***(s)he does not remove the staples***. The various pages must be folded back or a desperate defense attorney might argue that the State substituted pages.

It takes time to get the certified-exemplified copies and you may not have them by the (safe) deadline for filing priors. See "when" discussion, *infra*. If you do not have the documents, get a computer print out from your computer, the Sheriff's Office, Adult Probation Office, or the Department of Public safety and attach it.

If you cannot get that, call the sentencing court, get all the pertinent data (date, offense, county, case number, court division number, prosecutor, *defense attorney,* the sentence imposed, and anything else you can think of) and type it out and attach it to the allegation with a note indicating that it is provided only as information and does not purport to be an official document. It may not be what the court and defense attorneys are used to, but you have met the burden of "making available to the defendant a copy of *any* 'material or information' obtained . . ." and you have shown your good faith by alleging it as soon as possible. See *Hooker, supra,* and discussion in VI(B)(3), *infra*.

When the certified-exemplified does show up, immediately supplement the allegation with a copy. In *State v. Bouillon*, 112 Ariz. 238, 540 P.2d 1219 (1975), the court with some concern upheld enhanced sentencing where the State timely filed the allegation but did not provide any "material or information" until after the guilty verdict and before the trial on the prior. If you know about priors, but have not done anything yet, mention on the record at any opportunity that the State will be alleging priors.

A single prior can be alleged as a prior on each count in a multiple count indictment. *State v. Ferreira,* 128 Ariz. 530, 627 P.2d 681 (1981).

A non-dangerous prior cannot be used to enhance a dangerous offense. *State v. Armendariz,* 127 Ariz. 422, 621 P.2d 928 (App. Div. 1 1980). If the defendant is charged with a dangerous offense, but has two non-dangerous priors, go ahead and allege the priors. It will be treated at a sentencing as a non-dangerous offense with two non-dangerous priors which carries a greater sentence than a dangerous with no priors.

A dangerous with no priors carries the same sentencing as a non-dangerous with one prior. If the defendant therefore is charged with a dangerous offense, and has only one non-dangerous prior, it is not worth the effort to allege the prior unless you fear the jury may return a non-dangerous lesser included offense. The court has upheld the State's right to choose how the priors will be designated in this fashion. *State v. Laughter,* 128 Ariz. 264, 625 P.2d 327 (App. Div. 1 1980); and *State v. Zuniga*. 145 Ariz. 389, 701 P.2d 1197 (App. Div. 1 1985).

When you allege a dangerous offense as a prior, the allegation must specify that the State is treating the prior as dangerous nature.

When a defendant has two offenses pending, a defense attorney may attempt to get the trials set close enough that you would not have 20 days to allege the prior. When you know the dates of the trials, immediately file a notice that you intend to have the first conviction serve to enhance the second. See *Rodgers, supra.* On the date of the conviction of the first trial, slap a "regular" allegation of prior conviction on the defendant right on the spot.

If the verdict and sentencing are on separate dates (this is especially important if the second trial comes between those dates), argue that the cases cited in section II(C)(3) *(Sample, Russell)* stand for the proposition that the conviction and sentencing are separate and severable and, therefore, the prior can be alleged when the verdict is returned. *See also United States v. Klein,* 560 F.2d 1236, (5th Cir. 1977).

B. Deadline for Filing

A timely motion to allege priors cannot be denied. *State v. Birdsall,* 116 Ariz. 112, 568 P.2d 419 (1977), overruled on other grounds by *State v. Burge*, 167 Ariz. 25, 804 P.2d 754 (1990); *State v. Deddens,* 119 Ariz. 156, 579 P.2d 1126 (App. Div. 2 1978).

Another reason to file as soon as possible is that the defendant may try to *immediately* plead guilty, and a sympathetic judge who does not like mandatory sentencing will let him and you can do nothing about it. Once the court accepts the guilty plea, double jeopardy attaches and the State cannot allege prior felony conviction enhancements. *Parent v. McClennen*, 206 Ariz. 473, 80 P.3d 280 (App. Div. 1 2003). See also *State v. Nunez,* 108 Ariz. 484, 502 P.2d 361 (1972). In *State v. Geschwind* 136 Ariz. 380, 666 P.2d 480 (App. Div. 2 1982), reversed in part on other grounds by 136 Ariz. 360, 666 P.2d 460 (1983), the court held it was not error for a trial court to decline to hear a guilty plea at arraignment so as to give the State time to allege priors.

The deadline for filing an allegation of prior convictions is set out in A.R.S. § 13-703(N) which provides:

> The court shall allow the allegation ... at any time prior to the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings.

This change is important for several reasons. First, the statute takes as a starting point the proposition "(t)he court *shall* allow..." Secondly, the timing mark is "...the date the case is *actually* tried..." and not the old "dummy" first trial date set at arraignment that defense attorneys were fond of arguing was the cut off date.

Perhaps the most important change, however, is the fact that the court cannot arbitrarily deny an allegation filed within 20 days of the trial date. The court must find that the defendant was "in fact prejudiced" and state the facts supporting the finding of prejudice.

It is important to note that "prejudice" means legal prejudice, not inconvenience to the defendant or his attorney and not an increased sentence. The defendant should have to show that his ability to defend himself against the charge of a prior has been hampered by the untimely allegation. The court in evaluating the issue of prejudice should consider whether the state has informally let the defendant know that enhanced punishment will be sought.

After you have alleged priors, it is not necessary to arraign the defendant on the prior. See comment to Rule 14.3, Arizona Rules of Criminal Procedure; and *State v. Hodge,* 131 Ariz. 63, 638 P.2d 730 (App. Div. 2 1981). As a strategy point however, the defendant will often be willing to plead guilty to the prior, relieving the concerns about proving the prior later.

Where a defendant is released and flees, the state may thereafter make a timely allegation of prior convictions. The defendant has waived his lack or notice and he may be tried *in absentia* on the issue of priors. *State v. Bayliss,* 146 Ariz. 218, 704 P.2d 1363 (App. Div. 1 1985).

IV. PROVING PRIOR CONVICTIONS

A. General

During the presentation of the State's case-in-chief, the State or its witnesses cannot mention the defendant's prior convictions unless they are admissible under Rule 609, Arizona Rules of Evidence. You will know in advance if they are admissible because you must disclose them, Rule 15.1 (b)(6), and the defendant will usually seek to have them suppressed before trial.

B. The Defendant Can Plead Guilty

If the defendant wants to admit to the prior conviction, he may do so. Rule 17.6 provides that a guilty plea to a prior must conform to the same procedures as a guilty plea to the charge. This implies a full *Boykin* guilty plea procedure. *State v. Canaday,* 119 Ariz. 335, 580 P.2d 1189 (1978) and *Woratzeck, supra.*

The courts have overlooked some technical defects in accepting a guilty plea to a prior. *See State v. Nieto,* 118 Ariz. 603, 578 P.2d 1032 (App. Div. 1 1978); *State v. Alvarado,* 121 Ariz. 485, 591 P.2d 973 (1979). In *State v. Bushnell,* 121 Ariz. 350, 590 P.2d 466 (App. Div. 2 1978), however, the court remanded because it did not appear that the court advised the defendant of the range of sentence. It is good practice when accepting a guilty plea to a prior to advise the defendant of the aggravated, presumptive and mitigated sentences both with *and without* the prior. That insures his or her full understanding of the consequences of the plea. *See also State v. Riley,* 141 Ariz. 15, 684 P.2d 896 (App. Div. 1 1984). Failure to advise the defendant of the full consequences of his admission to his priors or his parole, probation or release status is not necessarily error, however. *State v. Allie,* 147 Ariz. 320, 710 P.2d 430 (1985).

Once a defendant admits the prior conviction, the defendant cannot later withdraw the guilty plea. *State v. Hooper,* 145 Ariz. 538, 703 P.2d 486 (1985).

C. The Defendant Can Admit the Prior While Testifying

If the defendant takes the stand and the judge has not precluded the State from impeaching him with his priors, the defendant will have to admit his prior convictions. Rule 17.6, Arizona Rules of Criminal Procedure, provides that the defendant's admission to the prior while testifying avoids the necessity of a *Boykin* plea. The courts have recognized that where the defendant admits the prior while testifying the trial court may enter an enhanced sentence upon a jury verdict of guilty to the substantive charge without further ado. *State v. Seymour*, 101 Ariz. 498, 421 P.2d 517 (1966); *State v. Thomas,* 109 Ariz. 399, 510 P.2d 45 (1973) (a post *Boykin* case which held *Boykin* does not affect rule); and *State v. Taylor,* 135 Ariz. 262, 660 P.2d 863 (App. Div. 2 1982); and, *State v. Cook,* 150 Ariz. 470, 724 P.2d 556 (1986). In *State v. McGriff*, 7 Ariz.App. 498, 441 P.2d 264 (App. 1968), the court approved of instructing a jury to return a guilty verdict where the defendant testified to his prior conviction.

Despite all that, it is strongly suggested that you do not take advantage of the defendant's admission. Keep in mind an admission is not the same thing as a guilty plea! The defendant may admit the crime to the police, but the State still has to prove it. If for some technical reason the defendant's admission does not cover all elements, you might suffer a reversal. In *McGriff, supra,* the court appears (a very confusing opinion with special concurrences) to have remanded because the defendant did not admit the county and date of the conviction! *See Woratzeck, supra.*

If you *insist* on trying to make an admission fly, at *least* get the certified-exemplified entry of judgment identified by the defendant as the crime he is admitting to and then admit it in evidence later at the prove prior mini-trial. Keep in mind, however, that if the defense attorney objects, the court may not allow you to have the defendant identify the document. Where the issue at hand is merely impeaching the defendant's credibility with a prior, and the defendant has admitted a prior, the intricate details of the prior could reasonably be held to be immaterial.

In *State v. Killian,* 118 Ariz. 408, 577 P.2d 259 (App. Div. 2 1978), the court held that it is proper for the prosecutor to ask the defendant "when and where" the priors were committed. In *State v. Williams,* 131 Ariz. 211, 639 P.2d 1036 (1982), you will notice that the prosecutor was prevented by trial court from having the defendant identify his sentencing documents or testify as to whether he was represented by counsel. The correctness of those rulings was not an issue on appeal.

D. Dangerous Nature Priors

When you have alleged a "dangerous nature" prior, you must prove that the defendant's conviction on the prior included the use of a deadly weapon or dangerous instrument or involved intentional or knowing infliction of a serious physical injury. *State v. Brydges,* 134 Ariz. 59, 653 P.2d 707 (App. Div. 1 1982). While submitting the issue to the fact finder is the preferred method, if a guilty finding on the charge necessitates a finding of "dangerousness," a separate finding is not necessary. In *State v. Barrett,* 132 Ariz. 106, 644 P.2d 260 (App. Div. 1 1981), the court held that the guilty finding on murder necessarily included a finding of serious physical injury under certain circumstances. See also *State v. Caldera,* 141 Ariz. 634, 688 P.2d 642 (1984) (armed burglary); *State v. Suniga,* 145 Ariz. 389, 701 P.2d 1197 (App. Div. 1 1985) (assault with deadly weapon finding by jury implies dangerous nature); and *State v. Hudson,* 152 Ariz. 121, 730 P.2d 850 (1986). In most cases, the sentencing order will note that the conviction is for a dangerous offense.

E. Post-Conviction Prove Prior Trial

"In order to prove a prior conviction, the state must submit positive identification establishing that the accused is the same person who previously was convicted, as well as evidence of the conviction itself. The proper procedure for establishing a prior conviction is for the state to submit a certified copy of the conviction and establish that the defendant is the person to whom the document refers." *State v. Cons*, 208 Ariz. 409, 415, 94 P.3d 609, 615 (App. Div. 2 2004) (internal citations omitted).

1. Documents

In most cases, you will prove the prior conviction with documentary evidence. A.R.S. § 13-607 provides that at the time of sentencing the court shall execute a "judgment of guilty and sentence document" at the time of sentencing in open court. The document provides useful

information such as establishing the legal sufficiency of the conviction and providing the means to identify the defendant. If the prior predates A.R.S. § 13-607, you must utilize whatever documents the court was using at the time.

In *State v. Hauss,* 140 Ariz. 230, 631 P.2d 382 (1984), the court held that where the state made a diligent effort to obtain documentary evidence, and was unable to do so, the testimony of the probation officer was permissible to establish the prior.

A certified copy of the prior documents is sufficient to put the defendant on notice of the date, place and type of conviction. *State v. Cons*, 208 Ariz. 409, 416, 94 P.3d 609, 616 (App. Div. 2 2004); *State v. Ramirez,* 115 Ariz. 70, 563 P.2d 325 (App. Div. 1 1977). A "certified true" copy is adequate from your own county but a certified-exemplified should be used if it is an out-of-county prior. Getting the documents in evidence requires a two step evidentiary consideration. The first is hearsay and the second is authentication.

In order to admit sentencing documents to prove a prior conviction, the State need not prove that the conviction was not later vacated on appeal or in post-conviction relief proceedings. There is a presumption of regularity that attaches to convictions. *State v. Cons*, 208 Ariz. 409, 416, 94 P.3d 609, 616 (App. Div. 2 2004).

a) Hearsay

Since the sentencing documents are indeed hearsay, an exception is necessary to get them in evidence. The appropriate hearsay exception is Rule 803(8), Arizona Rules of Evidence. *State v. Stone,* 122 Ariz. 304, 594 P.2d 558 (App. Div. 1 1979). Do not fall into the trap of trying to use Rule 803(22), Arizona Rules of Evidence. (judgment of previous conviction). That Rule states that the judgment is admissible "to prove any fact essential to sustain the judgment." You do not want to prove facts to sustain the judgment, you want to prove the judgment! *Stone, supra.*

As a collateral issue there is no problem with admitting a copy (properly authenticated of course) of the judgment, instead of the judgment itself. Rule 1003, Arizona Rules of Evidence, and *Stone, supra.* This is passed on, in case you run into a defense attorney who knows the words "Best Evidence Rule" but does not have a clue as to what they mean.

You may also encounter an objection that the self-authentication attachments are hearsay and should not be admissible to authenticate the hearsay documents. That was actually tried in *State v. Simmons,* 131 Ariz. 482, 642 P.2d 479 (App. Div. 2 1982), but the court pointed out that the Rules of Evidence do not apply to preliminary questions of admissibility.

It is improper for the prosecutor (or any one else) in the prior case to testify that the jury found the defendant guilty since that is hearsay. *State v. Hooper,* 145 Ariz. 538, 703 P.2d 482 (1985). However, once the sentencing documents are admitted, it is appropriate for any witness to the sentencing, including the prosecutor, to identify the defendant as the person sentenced therein.

b) Authentication

The hearsay exception discussed *supra*, does not get the evidence in, it only avoids the hearsay rule. Before a document is admissible it must be authenticated or identified. Rule 901, Arizona Rules of Evidence.

You could have the Clerk of the Court come and testify that the document is a true copy of the original on file. (S)he will not appreciate having to do so, especially if (s)he is from a different county.

The alternative is to have a "self authenticating" document. Rule 902, Arizona Rules of Evidence. A judgment and a "pen pack" both qualify as public records under Rule 902(4), Arizona Rules of Evidence. Rule 902(4) makes reference to certification in compliance to paragraphs 1, 2 or 3 of the Rule. A judgment will come under paragraph 1, "Domestic Public Documents Under Seal", as all clerks of the court have official seals. See the Constitution of Arizona, Article 22, §10, Arizona Revised Statutes. *Cf., State v. Stone, supra. See also State v. LeMaster,* 137 Ariz. 159, 666 P.2d 592 (App. Div. 1 1983). Where the photograph and/or fingerprints are an integral part of the whole certified package, they do not have to be separately certified. *State v. Stough,* 137 Ariz. 121, 669 P.2d 99 (App. Div. 2 1983), and *State v. Gillies*, 142 Ariz. 564, 691 P.2d 655 (1984).

Department of Transportation documents such as abstracts of driving records, titles and registration come in under paragraph 2, "Domestic Public Documents Not Under Seal." *State v. Floyd,* 120 Ariz. 358, 586 P.2d 203 (App. Div. 2 1978); *State v. Corrales,* 135 Ariz. 105, 659 P.2d 658 (App. Div. 2 1982).

When using a copy of the defendant's driving record during the main trial to prove suspension, revocation, etc., (as opposed to a post- trial, prove prior mini-trial) make sure you prepare a copy for use with all references to the defendant's driving convictions blocked out to go to the jury. In *State v. Geschwind*, 136 Ariz. 380, 666 P.2d 480 (App. Div. 2 1982), the court reversed, finding that the references were prejudicial.

As discussed in Section VI(A), *supra,* the review by the Supreme Court, *State v. Geschwind*, 136 Ariz. 360, 666 P.2d 460 (1983), changed the rule somewhat. If the basis for the felony DUI is a second conviction having not applied for a license, then the prior becomes an element of the offense, rendering evidence thereon admissible. It is this writer's opinion however, that if the felony basis is DUI on a revoked/ suspended, etc., the lower court decision is unaffected. The careful prosecutor should still prepare a copy of the revocation/suspension abstract with the basis therefore deleted.

Presumably, Department of Corrections records come in under the same theory as D.O.T. records, at least if they are certified by the department, but since they are usually certified and exemplified, the Clerk and Judge of the local superior court get into the act, so perhaps both paragraphs apply. *State v. Simmons,* 131 Ariz. 482, 642 P.2d 479 (App. Div. 2 1982). In *State v. Piedra,* 120 Ariz. 53, 583 P.2d 1373 (App. Div. 1 1978), the court approved of Rule 44, Arizona Rules of Civil Procedure as the admitting mechanism of prison records.

One must be careful when using D.O.C. records, that only official "records" kept in the usual course of business are utilized. In *State v. Williams,* 144 Ariz. 433, 698 P.2d 678 (1985), the State utilized an informal letter from D.O.C. the court could rely on such evidence, a jury could not.

Documents from a sister state may be self-authenticating. *State v. Simmons, supra; and State v. Geschwind, supra.* Similarly documents from the United States Government, its agencies, and the military are admissible. An interesting situation developed at the close of the trial of a celebrated polygamist in Phoenix. The State sought to admit "pen packs" from federal prisons. The documents were authenticated pursuant to 18 U.S.C. § 4004, which gives wardens, record clerks and others authority to administer oaths and take

acknowledgments. The defense argued that the documents did not fit any of the categories but the court allowed their admission. A computer search generated only two reported cases where the issue came up in a State court. The cases, both of which are out of California, are *People v. Pollart,* 25 Cal. Rptr. 678, 208 Cal.App. 2d 793 (1962), and *People v. Sowers*, 22 Cal.Rptr. 401, 204 Cal.App. 2d 640 (1962).

When you need to use a federal "pen pack" to identify the defendant, it is a good idea to go the extra mile. It would seem prudent to get a certified/exemplified copy of the sentencing documents from the sentencing court. The documents would then tend to cross-reference and cross-authenticate.

c) Presentation

You must get the document admitted into evidence. *State v. Little,* 104 Ariz. 479, 455 P.2d 453 (1969). Get the document marked by the clerk, hold it up, say the words "the State moves for the admission of State's exhibit number 50," hand it to the defense attorney, let the defense attorney present any objections about hearsay, authentication, etc., wait for the judge to rule on the objection and *DO NOT REST* until you hear the words "State's exhibit number 50 may be received in evidence!"

If the defense attorney argues that the subscribing witness did not testify, cite Rule 903, Arizona Rules of Evidence, and any number of the cases cited this section. If you got your documents late and they were not attached to your original allegation of prior, the defense attorney may argue that you should not be allowed to admit anything not included in the original package. In *State v. Hooker*, 128 Ariz. 251, 624 P.2d 1299 (App. Div. 2 1981), the trial court was reversed in a special action for excluding documents not contained in the original allegation. *See also State v. Bouillon,* 112 Ariz. 238, 540 P.2d 1219 (1975).

Occasionally you may have an out-of-town witness testify in your case-in-chief, who you need to connect the defendant to the documents in the prove prior trial. Reciting the exhibit number, show the witness the document, have the witness identify the defendant as being connected to the document, return the document to the clerk, all without moving to admit the document. After the guilty verdict and during the prove prior trial, move to admit the document reciting the testimony already adduced at trial connecting the document to the defendant. This similarly works well in a situation where the defendant takes the stand, and the court has suppressed the prior for impeachment purposes. Show the defendant the documents (let the court and defense attorney know what you are up to in advance) have him identify them, and return them to the clerk.

2. Identification of the Defendant

The defendant must be identified as the same person previously convicted. *State v. Cons*, 208 Ariz. 409, 94 P.3d 609 (App. Div. 2 2004); *State v. Salazar,* 3 Ariz. App. 114, 412 P.2d 289 (App. Div. 2 1966), overruled in part on other grounds by *State v. Eyman*, 104 Ariz. 296, 451 P.2d 877 (1969). The identity of the defendant is a jury question. *State v. Norgard*, 6 Ariz.App. 36, 429 P.2d 670 (App. Div. 2 1967). The defendant can be compelled to be present at the prove prior trial. *State v. Morse,* 127 Ariz. 25, 617 P.2d 1141 (1980).

a) Witness to Trial/Sentencing

A very good way to prove identification of the defendant is through a witness to the trial or sentencing. If the trial (plea) was in your own jurisdiction, this method should not be too

difficult. A probation officer is an excellent choice since (s)he probably had substantial contact with the defendant and there is often a picture of the defendant in the probation file to refresh his or her recollection. *State v. Ramirez,* 115 Ariz. 70, 563 P.2d 325 (App. Div. 1 1977).

You can call any of the court personnel who were witnesses to the sentencing such as the clerk, the bailiff, the court reporter, and even the judge. You can even call the defense attorney who represented him on the prior. *State v. Alexander*, 108 Ariz. 556, 503 P.2d 777 (1972). (No attorney-client privilege on question of I.D.).

b) Self-Identifying Documents

Some documents by their nature can identify the defendant. In the following cases, the court approved of the use of certified copies of prison records containing a photo of the defendant and his fingerprints. *State v. Norgard,* 6 Ariz.App. 36, 429 P.2d 670 (App. Div. 2 1967); *State v. Baca,* 102 Ariz. 83, 425 P.2d 108 (1967); *State v. McGonigle,* 103 Ariz. 267, 440 P.2d 100 (1968). ("In the case at hand the jury could easily compare them with the defendants on trial"), and *State v. McAlvain,* 104 Ariz. 445, 454 P.2d 987 (1969).

In *McAlvain*, the "pen pack" had both a photo and fingerprints. The State offered no evidence on the fingerprints. The Supreme Court rejected the argument that the State should have offered the more conclusive evidence on fingerprints holding it was a jury question and that there was sufficient evidence to support the jury's verdict.

In *State v. McGuire*, 113 Ariz. 372, 555 P.2d 330 (1976), the State brought in a fingerprint expert, had him take a print from the defendant in front of the jury, compared it to a "copy" of the defendant's pen pack, and testify as to positive identity. Too bad it wasn't a "certified copy." Do it like they did in *State v. Greer,* 118 Ariz. 349, 576 P.2d 1004 (App. Div. 1 1978). In *State v. Moreno,* 128 Ariz. 33, 623 P.2d 822 (App. Div. 1 1980), the court approved of identifying the defendant through a description of tattoos in the defendant's "scar sheet" in the defendants pen pack.

After 1985, A.R.S. §13-607 requires that all judgments of guilt contain several important recitations and the defendant's fingerprint. If your prior was entered after the effective date of the statute, you will automatically have available a "self-identifying" document. Be sure to subpoena a fingerprint examiner before trial, so you don't have to scramble to prove the prior if the defendant doesn't admit his prior convictions during the trial.

c) Creative Identification

Moreno, supra, is a good example of creative identification. If the defendant signed his conditions of probation, plea agreement, notice of right to appeal or release conditions, have a questioned documents examiner testify. Did the defendant admit his prior conviction to friends, family, his parole officer, or the arresting officer? Have them testify.

Use such things as physical descriptions, date of birth, address, the vehicle he drove, anything that ties the defendant to the other case. If the defendant is deserving of being put away for a long time, you will think of something. The cases in Section 2(b), *supra*, stand for the proposition that if there is any evidence, it may properly be submitted to the fact finder. Do not quit now!

3. Burden of Proof

The State has the burden of proving a prior conviction by clear and convincing evidence. *State v. Cons,* 208 Ariz. 409, 412-13, 94 P.3d 609, 612-13 (App. Div. 2 2004). Note that a prior conviction is the only maximum penalty-increasing sentencing enhancement that does not have to be proven to a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). If a sentencing enhancement increases the maximum penalty beyond the statutory presumptive, it must be proven to a jury.

That the defendant has the identical name is not enough to prove the prior conviction. *State v. Pennye*, 102 Ariz. 207, 427 P.2d 525 (1967). If your proof does not pass muster after the first trial, double jeopardy prevents an attempt to prove it upon retrial. *State v. Corrales,* 26 Ariz.App. 344, 548 P.2d 437 (App. Div. 2 1976). Double jeopardy does not, however, prevent a trial to a different jury if the case has been remanded. *State v. Riley,* 145 Ariz. 421, 701 P.2d 1229 (App. Div. 1 1985).

The trial court does not have to repeat all of the general jury instructions before giving the sentencing enhancement determination to the jury. *State v. McGonigle*, 103 Ariz. 267, 440 P.2d 100 (1968); *State v. Loggins*, 13 Ariz.App. 577, 479 P.2d 724 (App. Div. 1 1971).

After you have proved the sentencing enhancement, make sure the court recites its "entry of judgment" on the prior conviction. *State v. Lopez,* 120 Ariz. 607, 587 P.2d 1184 (1978).

It is not necessary to show that there was a "factual basis" for the prior offense. That was done at the trial or change of plea on the prior. *State v. Cuzick,* 154 Ariz. 231, 741 P.2d 698 (App. Div. 1 1987).

V. OTHER ENHANCEMENTS

A. Felony While on Pretrial Release From a Felony

Prior to April 23, 1980, if a defendant committed a felony while on pre-trial release from a felony, he could be charged with a separate offense under A.R.S. §13-3970. That provision has been repealed and is now replaced by A.R.S. §13-708(D). A different procedure must now be utilized. We will assume that the defendant commits felony number 1, is released from custody, and commits felony number 2.

The usual situation will be that the trial of felony number 1, will occur prior to the trial of felony number 2. It appears that there is no case law interpreting the new code. If, however, the old law provides any guidance, there must be a conviction on both felonies. *See Miller v. Superior Court,* 114 Ariz. 130, 559 P.2d 686 (App. Div. 2 1976). Therefore the appropriate procedure would be to file an addendum to the indictment on the second charge (felony number 2). Since you will probably be alleging felony number 1 as a prior to felony number 2 anyway, the documents should be filed at the same time.

1. Must Prove to a Jury

An allegation pursuant to §13-708(D) must be proven to a jury beyond a reasonable doubt. *State v. Gross*, 201 Ariz. 41, 31 P.3d 815 (App. Div. 1 2001), citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2348 (2000) ("[o]ther than the fact of a prior conviction,

any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). See also *State v. Benenati,* 203 Ariz. 235, 52 P.3d 804 (App. Div. 2 2002).

In *State v. Powers,* 154 Ariz. 291, 742 P.2d 792 (1987), the court held that where the state has alleged the defendant's escape status as an enhancement pursuant to A.R.S. §13-604.02 (now §13-708(D)), the issue must be decided by the jury after conviction on the substantive charges. The court reasoned that the jury must decide the issue because "escape" is in and of itself a crime with a culpable mental state. The court said in a footnote however that if the defendant had been found guilty of escape in a jury trial on those charges, the sentence could be enhanced by the court on the crime committed while on escape without a separate referral to a jury. That suggests of course that a not guilty jury verdict in an escape trial would preclude enhancement in the crime committed while on escape with or without a jury referral of *res judicata.*

When the time comes to hear the post-verdict prove prior mini-trial in the second case, you admit evidence that not only did the defendant commit felony number 1, but that he committed felony number 2, for which the jury just convicted him while he was released on felony number 1. Admit in evidence certified copies of his release questionnaire and order and present evidence that it is the same defendant. This evidence would ideally involve a witness to the release, perhaps even the judge or magistrate. In the smaller counties there are often no attorneys or other witnesses present during the initial appearance. Any of the other methods set out in Section IV(E)(2)(c), *infra*, would also be useful.

The better practice is to file a formal allegation that the state seeks to enhance the defendant's sentence pursuant to A.R.S. § 13-708, but a citation to the statute provides sufficient notice of the state's intent to seek an enhanced sentence. *State v. Paredes*, 181 Ariz. 47, 51, 887 P.2d 577, 581 (App. Div. 2 1994) (on grounds of dangerousness).

2. Construction with Other Enhancements

The two year tag imposed pursuant to A.R.S. §13-708(D) is consecutive to any other sentence imposed including one imposed pursuant A.R.S. §13-708 (A)-(C). *State v. Thompson*, 147 Ariz. 565, 711 P.2d 1238 (App. Div. 1 1985). In *State v. Swartz,* 140 Ariz. 516, 683 P.2d 516 (App. Div. 2 1984), the court held that A.R.S. § 13-604(M) (now §13-708(D)) was the proper form of enhancement where the trial court erroneously released the defendant for a few days prior to starting to serve his sentence and the defendant committed the subsequent offense.

B. Felony While Released From Post-Conviction Confinement

A.R.S. §13-708(A) provides for increased penalties if an dangerous offense is committed while the defendant is on probation, parole, work furlough or any other post-conviction release. The sentence for the new offense shall be no less than the presumptive and must be served 100% (no early release, community supervision, or commutation).

If the new offense is non-dangerous, and the offense was committed while on probation, parole, work furlough, or any other release, A.R.S. § 13-708(C) provides that the sentence is at least the presumptive, stacked, and the defendant must serve the sentence imposed. The sentencing provisions of A.R.S. § 13-708 are mandatory. *State v. Avila,* 141 Ariz. 325, 686 P.2d 1295 (App. Div. 2 1984).

1. Proving the Enhancement

If the defendant's timing fits A.R.S. § 13-708, file documents to allege the commission of the felony while released from confinement. In *State v. Villafuerte,* 142 Ariz. 323, 690 P.2d 42 (1984), the court held that a formal allegation need not be contained in the indictment (or an amendment thereto) and that a mere statutory citation was sufficient. The timing on the filing of the allegation is similar to other allegations. It is the better practice, however, to file a separate allegation that the offense was committed while on release.

It is submitted that the remedies in A.R.S. §13-708 are in addition to all other provisions. So if you had a two-time burglar on parole commit armed robbery, get released ROR, then do another burglary, you could allege (in the most recent burglary case) two priors, A.R.S. §13-703, commission while released ROR, A.R.S. §13-708(D) and commission while released from confinement, A.R.S. §13-708(A)! Upon conviction and proof of the enhancement facts, the presumptive for a Class 2 Felony with two priors is 15.75 years. Tack on two years for §13-708(D). Pursuant to A.R.S. §13-708(A) the judge must sentence to 17.75 as a minimum and the defendant must serve the sentence imposed (not eligible). All of that would be consecutive to whatever he got for violating probation and the armed robbery.

The state must prove the §13-708(A) allegation to the judge by clear and convincing evidence. It need not prove the allegation to a jury beyond a reasonable doubt because the enhancement increases the statutory minimum, not the statutory maximum sentence. *State v. Cox*, 201 Ariz. 464, 37 P.3d 437 (App. Div. 1 2002). The defendant must be put on notice of state's intent to seek punishment under A.R.S. § 13-604.02 (now §13-708(A)). *State v. Waggoner,* 144 Ariz. 237, 697 P.2d 320 (1985). If defendant leaves the jurisdiction and does not get notice, enhanced sentence may nevertheless be imposed. *State v. Love,* 147 Ariz. 567, 711 P.2d 1240 (1985).

The court should review certified documents and identification evidence for clear and convincing evidence of defendant's parole status. *State v. Hurley,* 154 Ariz. 124, 741 P.2d 257 (1987). In *State v. Avila,* 147 Ariz. 330, 710 P.2d 440 (1985) the court held that it is permissible for the court when determining release status to review confidential prison records *in camera* without admitting them in evidence.

The state does not have to prove that rules and regulations for work furlough were adopted and filed. *State v. Webb,* 149 Ariz. 158, 717 P.2d 462 (App. Div 2 1986). The state does not have to prove that the defendant accepted his parole by signing terms of an agreement; he is assumed to have accepted early release by leaving the prison. *State v. Hudson*, 158 Ariz. 455, 763 P.2d 519 (1988).

2. Double Jeopardy

The use of a prior to increase the range of sentence and also to use release from that prior to eliminate release credits pursuant to A.R.S. § 13-604.02 (now §13-708) is not double jeopardy. *State v. Torrez,* 141 Ariz. 537, 687 P.2d 1292 (App. Div. 1 1984); *State v. Martinez*, 172 Ariz. 437, 837 P.2d 1172 (App. Div. 1 1992). "Release" includes "mandatory release". *State v. Caldera,* 141 Ariz. 634, 688 P.2d 642 (1984). The state may produce additional evidence of a defendant's parole status at a resentencing hearing without violating double jeopardy. *State v. Hudson*, 158 Ariz. 455, 763 P.2d 519 (1988).

3. Sufficiency of the Evidence

The state can prove the sentencing allegation by certified copies of documents that established defendant's convictions and/or by the testimony of the defendant's parole officer. *State v. Strong*, 185 Ariz. 248, 251, 914 P.2d 1340, 1343 (App. Div. 1 1995). The court can also take judicial notice of its own files. See *State v. Rushing,* 156 Ariz. 1, 749 P.2d 910 (1988). If the state cannot obtain the necessary documentation, "it must show that it used reasonable diligence in attempting to obtain it and that the evidence that is introduced in its place is highly reliable." *State v. Richards*, 166 Ariz. 576, 579, 804 P.2d 109, 112 (App. Div. 2 1990). A presentence report does not meet that standard. *Id.*

Where the State's evidence merely proved that defendant was sentenced to 2 years prison in Texas and that 1 year later he committed the instant offense, there was insufficient evidence to establish that he was on release (i.e., he could have been pardoned!). *State v. Sowards,* 147 Ariz. 185, 709 P.2d 542 (App. Div 2 1984).

A defendant remains "on probation" for purposes of this sentence enhancement statute as long as his probation term has not been discharged. Thus, the statute serves to enhance a sentence for a defendant who commits a crime while not appearing for supervision or leaving the jurisdiction in violations of the terms of his release. *State v. Meehan*, 139 Ariz. 20, 676 P.2d 654 (App. Div. 2 1983).